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In The

Supreme Court of the United States

October Term, 1983

ZENOBIA E. HURLEY and LLOYD A. HURLEY,

Petitioners,

vs.

ALBUQUERQUE TITLE COMPANY, INC., and COMMONWEALTH LAND TITLE INSURANCE CORPORATION,

Respondents.

On Writ of Certiorari to the Court of Appeals in the State of New Mexico

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is the "General Exception" in the Commonwealth Land Title Co. Title Insurance Policy "unconstitutional" as a discrimination based on sex? The Exception (App. 12) states "This policy does not insure against loss or damage by reason of the following: 5. Community property, owner, courtesy, survivorship or homestead rights, if any, any spouse of the insured." Petitioners were and are at all times residents of New Mexico, a community property state, and held all property as community.

Is the "General Exception" a violation of New Mexico's own Equal Rights Amendment, Art. II, Sec. 18, and is that violation by the State Judiciary within the prohibition of the 14th Amendment that "no State" can violate?

Was there a denial of "due process" and "equal protection" in the Appeal itself by the New Mexico Court of Appeals by its false use of a Memorandum Opinion and was the Constitutional issue of discrimination thus obscured?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties.

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

OPINIONS BELOW

The Opinion by the Court of Appeals for the State of New Mexico was a Memorandum Opinion (App. 2-6) which was attached to the Mandate from the New Mexico Court of Appeals, dated September 20, 1983 (App. 50).

Because this is a Memorandum Opinion, it is not "published" nor a "precedent" according to Rule 7 New Mexico Supreme Court Miscellaneous Rules 9 (App. 48).

JURISDICTION

The Opinion and the Mandate of the New Mexico Court of Appeals was filed September 20, 1983 (App. 5). According to New Mexico Appellate Procedure a Written Opinion comes down first from the Court of Appeals, which occurred on July 26, 1983 (App. 2). Then a Petition for Rehearing was filed on August 5, 1983 and denied on August 8, 1983 (App. 8). Pursuant to New Mexico Appellate procedures, Certiorari to the New Mexico Supreme

Court was filed on August 29, 1983 (App. 35), and denied on September 15, 1983 and sent back to the Court of Appeals on the same date (App. 7). The New Mexico Court of Appeals issued its Mandate to which the Memorandum Opinion was attached on September 20, 1983 (App. 50).

Jurisdiction of the Court is invoked pursuant to 28 USC § 1257 (3).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

1. Constitution of the United States, Amendment XIV:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Constitution of the State of New Mexico, Article II, §18:

No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person. The effective date of this amendment shall be July 1, 1973. (As amended November 7, 1962.)

3. Constitution of the State of New Mexico, Article II, §§1, 2, 3 and 4:

Section 1. [Supreme law of the land.]

The state of New Mexico is an inseparable part of the federal union, and the constitution of the United States is the supreme law of the land.

Section 2. [Popular sovereignty.]

All political power is vested in and derived from the people: all government of right originates with the people, is founded upon their will and is instituted solely for their good.

Section 3. [Right of self-government.]

The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state.

Section 4. [Inherent rights.]

All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.

4. Constitution of the State of New Mexico, Article VI, § 2:

[Supreme Court; appellate jurisdiction]

Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court. In all other cases, criminal and civil, the supreme court shall exercise appellate jurisdiction as may be provided by law; *provided that an aggrieved party shall have an absolute right to one appeal.* (As amended September 28, 1965.)

The following Community Property provision of the New Mexico Annotated (1978) are invoked in this Petition:

40-3-7. Purpose of act.

The purpose of the Community Property Act of 1973 [40-3-6 to 40-3-17 NMSA 1978] is to comply with the provisions of Section 18 of Article 2 of the constitution of New Mexico, as it was amended in 1972 and became effective on July 1, 1973, by making the provisions of the community property law of New Mexico apply equally to all persons regardless of sex.

40-3-8. Classes of property.

B. "Community property" means property acquired by either or both spouses during marriage which is not separate property.

STATEMENT OF THE CASE

The New Mexico Courts have intentionally exceeded their governmental powers as constitutionally defined and have intentionally claimed the right to exercise their state judicial power to override the constitutional rights of the petitioners.

Art. II, §§ 1, 2, 3 & 4 of the New Mexico Constitution Bill of Rights state that the Constitution of the United States of America is the supreme law of the land.

Art. II, §§ 2, 3 & 4 assert that the state government is denied from the people and consequently all governmental officials, including judges, must observe that mandate.

Art. II, § 4 provides that "all persons are born equally 'free' and have 'certain unalienable rights'". This means that the Judiciary in 1983 must protect that "equality". The Court of Appeals says it will not do so. It chooses to debate these Petitioners and to make even an "exception".

Judicial officials in the state take oath to uphold the Federal and State Constitution. They do not recognize constitutions as limitations upon their authority. To allow this is to destroy constitutional government.

The thrust of the message to the Court by the New Mexico Court of Appeals is that these Petitioners are not worth your time. There are so many other more important people. The Court of Appeals tells you that they will not do this to anyone else. That is why the Court labeled it a Memorandum.

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FACTS

On December 13, 1977, Lloyd A. Hurley, a Petitioner herein, was married to Zenobia Hurley, the other Peti-

tioner. They were long time residents of New Mexico and all assets involved here were community assets.

On December 14, 1977, the respondents issued an owners Title Insurance Policy on a tract of land situated in Bernalillo County, New Mexico (App. 8, 9). The named insured was Lloyd A. Hurley, who took title as "a married man trading his sole and separate estate." (App. 22). The Warranty Deed transferring the property contained the same title recitals and the same legal description was expressed in both documents and also in a mortgage policy which was issued to the Bank, who provided not quite all of the purchase price (App. 9, 10, 11, 31, 32, 33). The amount provided by Lloyd Hurley was community as was the costs, premium on Mortgage Poiicy, etc. (App. 2). The Title Policy appears in the Appendix (App. 8-21).

The Petitioner, Zenobia Hurley, who was the wife of Lloyd A. Hurley, was not notified of the transaction and was not asked to sign the mortgage (App. 32, 44, 45). On the following day, December 14, 1977, Lloyd A. Hurley filed for a divorce in Bernalillo County, New Mexico. The sworn testimony of Tomi Garcia, who represented both the respondents, but was the paid employee of the Albuquerque Title Company, stated that the Title Company knew that legally the title to the conveyed property was not Lloyd A. Hurley's sole and separate estate, but was in fact community property (App. 45, 46).

Therefore, both Title companies issued Title Policies with knowledge of their falsity. The record in the New Mexico Court of Appeals on page 204 shows the following: Q. "Since you deal with titles and things like that, how did you come to the conclusion that legally it would be his sole and separate estate?" Answer: "Legally it would not have been his sole and separate estate." (App. 46).

The Respondent, Albuquerque Title Company, actually perpetrated the false recitals and the Commonwealth Land Company was the insuring company (App. 30, 31). The Albuquerque Title Company representative collected the premium, had the owner and mortgage recorded, and acted as the escrow agent (App. 30). The insuring company accepted its share of the premiums. It has refused to honor its insuring agreements wherein the policy states: "a Pennsylvania Corporation . . . insures . . . against loss or damage by reason of: 1. Title to estate or interest described in Schedule A being otherwise than as stated, therein." (App. 9).

In the divorce proceeding, New Mexico courts found that the property was community and the Supreme Court of New Mexico so stated in an appeal of the divorce action between the two Petitioners herein. *Hurley v. Hurley*, 94 NM 641, 645, 615 F. 2d 256, 260. The undisputed admission of the Respondent shows that they knew the title was not in Lloyd A. Hurley as his sole and separate estate (App. 46). The New Mexico Court of Appeals has declared as a matter of law that neither Petitioner has a claim in contract or tort (App. 2-6) against either or both Title Companies, respondents.

The New Mexico Court of Appeals issued a "Memorandum Opinion" which, in New Mexico, means that it is not published or promulgated and it has not been, pursuant to instructions to the Clerk's Office. A "Memorandum Opinion" is defined in New Mexico Supreme Court Rules Pamphlet, 9 Miscellaneous Rule, NMSA 1978 and is in App. 49. The Memorandum Opinion refers to a 10th Circuit Opinion wherein Zenobia Hurley sued Commonwealth Land Title Company. Her husband, Lloyd A. Hurley, was not a Party nor was the Albuquerque Title Com-

pany a Defendant. Those persons are Parties in the instant case. The 10th Circuit Case is found at 647 F. 2d 1055 (1981).

The issue and the violation of the Federal Constitution via the Memorandum Opinion was presented to the New Mexico Court of Appeals by asserting that "the basic reason for the constitutional violation is that this Opinion is not intended to either follow existing law or to change it. It is neither stare decisis nor a motion to change existing law." Petition for Rehearing, Page three (App. 24). Petitioners claimed that whether it was "special protection" for the Title Companies "or the deprivation of rights for the enforcement of duty in tort or contract . . . it violated equal protection of the laws because all parties involved are not being treated like other parties who have or will litigate Title Insurance Policies where there is an intentional misstatement by the Title Companies" (App. 24).

The Petitioners herein are claiming "discrimination" in the General Exception and "discrimination" in the Appeal as evidenced by labeling the Opinion a "Memorandum Opinion". One discrimination prompted the other and the other (unequal Appeal treatment) proved the first discrimination (Exception based on sex). When the two "discriminations" are viewed together, we assert that the New Mexico Courts wanted to make an "Exception" of the Hurleys.

The Summary Judgment by the New Mexico Court of Appeals on Zenobia Hurley were on her claims for fraud, estoppel, slander of title, etc., all of which were alleged in her Complaint (App. 33, 34). The New Mexico Court of Appeals gets no support from the 10th Circuit Opinion,

supra, which said they were "premature", *Zenobia Hurley v. Commonwealth Land Title Company,* infra.

The doctrine of collateral estoppel and res judicata are used in the New Mexico Court of Appeals Opinion. *Zenobia Hurley v. Commonwealth,* supra, in the 10th Circuit, established that those tort claims are valid since its ruling of "prematurity" necessarily recognizes her right to a Trial.

The Memorandum was not a constitutional appeal and violates the 14th Amendment as was stated time and again in our Petition for Rehearing to the New Mexico Court of Appeals (App. 23-25).

Zenobia Hurley filed a Petition for Certiorari in this Court in *Zenobia Hurley v. Commonwealth Land Title Company,* 647 F. 2d 1055, and Certiorari was denied. Reference is made to the Petition and the Opposition on file in this Cause October Term 1980, Cause No. 81-436. An analysis of all litigation, State and Federal, on the Title Policy shows that Petitioners have never been given an opportunity to show the facts. They have been barred from any opportunity to go to trial by Summary Judgment and rulings of "prematurity". Can the admitted fraud in intentional falsification of a land title be barred from presentation by the Plaintiffs as a case? (App. 45).

Federal Question Was Raised.

The Petitioners raised Federal Constitutional issues throughout the proceedings (App. 23, 24, 25, 26, 27). Also pages 29-32, of Appellant's Brief in Chief, asserted a violation of the 14th Amendment. Appellant's Brief in Chief to the New Mexico Court of Appeals has as heading: (a) Dismissals herein violate the Constitutional Right of Access to the Court, Page 17. (b) The *Judgment* itself is

unconstitutional, Page 29. Two arguments in the above expressly cited the U. S. Constitution the 14th Amendment. (c) Appellant Zenobia Hurley contends that the Title Policy "Exclusion" of her Community Property Interest is also unconstitutional (App. 23, 27, 28).

The Memorandum Opinion admits that Petitioners raised "the 'community property exclusion' portion of the contract as unconstitutional and the dismissals violate the Plaintiffs constitutional right. It was also done in the Petition for Rehearing, Pages 2-3 (App. 23, 24). It was therein stated that New Mexico's Constitutional guarantees "one appeal", Art. II, Sec. 18, NMSA Volume I, and Petition for Rehearing also stated, Page 2 (App. 23). "The Supreme Court of the United States has declared that when a state gives to litigants a right of appeal, that said appeal must comply with the 14th Amendment, United States Constitution." Petitioners presented this to the New Mexico Court of Appeals and to the Supreme Court of New Mexico in its Petition for Certiorari claiming that Petitioners had not been accorded their "one appeal" (App. 26).

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REASONS FOR GRANTING THE WRIT OF CERTIORARI

Preface

Petitioners main point is that the "General Exception" by excluding the community property interest of the spouse is a prohibited discrimination based on sex, 14th Amendment.

This Petition gives first treatment to that issue, then it discusses the Memorandum Opinion by the New Mexico Court of Appeals in the various rulings contained herein, *and* discusses the Appellate Courts decision to make its decision a Memorandum Opinion.

Petitioners assert that the use of a Memorandum Opinion was to disguise their endorsement of the "Exception" and therefore a denial of Petitioner Zenobia's claim that coverage to her was discriminating based on her position as "Spouse". Strangely, the Opinion also denied coverage to the husband because coverage was denied to her "spouse".

The Title Companies thus got double relief out of an unconstitutional "General Exception."

Petitioner will treat in some detail the laws and cases from New Mexico to show that the Memorandum rulings were against all existing New Mexico precedents, and contend that these rulings were intended to obscure the real 14th Amendment discrimination and create the impression that the Opinion was merely passing on matters of state laws and their interpretation. The use of the Memorandum Opinion was the means to make the decision upholding the "General Exception" discrimination only applicable to this Petitioner, Zenobia and her then husband. By means of a Memorandum Opinion, which is by Rule of Court not published or be used as a precedent, the New Mexico Court of Appeals made an isolated ruling and in so doing made an exception as to Petitioners and their case which per se is a violation of "equal protection of the laws." (14th Amendment).

The exposure of the grossly erroneous proposition of law and unstated or understated facts is for the purpose of showing that there was 14th Amendment violation in the Memorandum itself as a means of hiding the violation of the 14th amendment in the "General Exception" discrimination (App. 12).

It is thus not true that the New Mexico Court of Appeals did not pass on the Discrimination in the "General Exception" and upheld it.

The "General Exception" (App. 12 and 13) Excluding Policy Coverage for "Community Property" "Rights" "of any Spouse" Is Unconstitutional as a Gender Based Discrimination.

Petitioners' request for relief is based on the unconstitutionality of a provision in the Policy under the "General Exception" which says "this policy does not insure against loss or damage by reason of the following: . . . *Community property* owner, courtesy, surroundings or homestead rights, if any, any *spouse* of the insured" (App. 12). This is the policy "Exception" used by the New Mexico Court of Appeals to protect the defendants from liability as a matter of law (App. 4, 5, 12). The Complaint by Petitioner (App. 31, 32, 33), claimed breach of the contract of the insurance and also claims tortious invasions for intentional misrepresentation, fraud, slander of title, etc. (App. 33, 34).

In dismissing the tort claim as well as the contract claims, the Opinion (App. 5 and 6), fundamentally used the same "General Exception" (App. 4), to immunize the defendants from their liability for their intentional breach of their own policy provisions (App. 6).

The Constitutional violation involved in the "General Exception" (App. 4, 5, 12), is "discrimination" based on sex as a violation of the 14th Amendment. Community real estate is an undivided interest in each spouse (App. 3, 31, 33). The insurers knew that the named insured was a married man (App. 45, 46), and that Zenobia Hurley was the spouse (App. 31, 32), and knew also that "community" credit was being supplied by the mortgage (App. 2), to pay for the major part of the purchase price (App. 2, 32), and that premium was collected for the entire tract which included the "spouse's" one-half ownership (App. 26). Petitioner claims that the "Exception" is unconsti-

tutional as a gender based violation of "equal protection" of the 14th Amendment. As to the husband, who was the named insured (App. 8), the Opinion used the "Exception" (App. 4, 5, 12) of wife as the means by which the false title recital as to him are declared not to be false title recitals (App. 8) at all (App. 5). The "Exception" then is the basis by which no liability attached (App. 4, 5, 6). The same is true for the dismissal of the tort claims (App. 33, 34) by both husband and wife since the Opinion finds no duty to exist because the contract "Exceptions" excludes contract coverage (App. 4, 5, 6). The proof for the correctness of the above, viz., that the gender based ("spouse") "Exception" was the basis for the Opinion (App. 4, 5), are in these words "Dr. Hurley — Contract Claims. *Summary Judgment was proper.* Community property claims were excluded under Schedule B of the Contract which states: This policy does not insure against loss or damage by reason of the following:" (App. 4). It then quotes the "spouse" exception (App. 5).

"The rights of the Parties are fixed by the Contract and the particular risk being *excluded* by the *contract* there is no liability under the contract" (App. 5). This immediately followed quoting the "General Exception" denying insurance coverage (App. 4, 5). At the Opinion's conclusion it repeats "a Title Policy is a contract and as such its terms established the duties and liabilities of the parties" (App. 6).

The "Exception" is the basis for the dismissal as to both Petitioners. The Opinion rests upon the validity of the "Exception" which applies to the "community" interest of any "spouse" (App. 4, 5). Zenobia Hurley did not get coverage on her land *because* she was a "spouse". Using that decision as a premise, the Opinion dismisses as

to the husband because they dismissed Zenobia Hurley as "spouse" (App. 4, 5). In reality the Opinion falsely excludes the whole property covered by the policy because it is community property. The Opinion thus jumps from the "General Exception" (App. 4, 5), which covered only the "spouse" of the named insured, and falsely substitutes the property itself in its entirety and excludes community property interest of both husband and spouse in an illogical sequence, "the particular risk being excluded by the contract, there is no liability under the contract" (App. 5). The "Exception" being a gender based discrimination, furnishes the unconstitutional support for the entire dismissal (App. 4, 5, 6).

In these days of anti-discrimination based on sex, *Arizona G. Comm. for Tax Def. Ann. v. Norris,* 463 U. S. —, 73 L. Ed. 2d 1236, 103 S. Ct. 3492, decided July 6, 1983; *Wengler v. Druggist Mutual Ins. Co., et al.,* 446 U. S. 142, 64 L. Ed. 2d 107, 100 S. Ct. 1540; *Kirchberg v. Feenstra,* 67 L. Ed. 2d 22, 101 S. Ct. 1195; *Sharon Frontiero v. Elliott Richardson,* 411 U. S. 677, 36 L. Ed. 2d 583, 93 S. Ct. 1764; *Reed v. Reed,* 404 U. S. 71, 30 L. Ed. 2d 92 S. Ct. 251 (1971); *Duncan v. General Motors* (CCA 10th), 499 F. 2d 835 (1974), to eliminate "a spouse" whose property was conveyed by the "description" in the policy (App. 8, 11, 12) and for which a premium was paid (App. 33) is a forbidden "discrimination".

As regards the husband, it is not true law to say that because he asked for the title in his own name that the title Company in giving him that, is immunized from the violation of the first insuring agreement which says they promise to pay if the title is otner than as stated in their title recitals (App. 9). The Memorandum does not explain this or give any authority. *How* this can be the

basis for affirming a Summary Judgment against Petitioner, Lloyd Hurley, on his Title Policy claim and dismissing his tort claim of fraud, etc., is not stated, especially when the Record shows that he "relied upon the defendants to correctly state the legal titles to the purchased property." (App. 32, 33).

Summary Judgment dismissals by the lower court or by the Court of Appeals, as in this case, have always considered "facts" and "inferences" from "facts". *Agnew v. Lebby*, 53 N. M. 56, 201 P. 2d 775. The Memorandum Opinion disregards this. The New Mexico Court of Appeals reversal of the trial court's denial of defendants' Summary Judgment on the tort claims would, according to all precedents, require discussion in the Opinion. "Summary Judgment is a drastic remedy." *Cebolleta v. Romero*, 98 N. M. 1, 644 P. 2d 515. Since no required discussion was given by the Memorandum in the Summary Judgment, the rulings are apparently rulings based on legal principles alone. The Memorandum's principle for Dismissing Lloyd Hurley's claim on the Policy lists principles of law, but fails to mention any facts relative to the principles (App. 4, 5, 6).

The elimination of any factual discussion proves that the Memorandum does not consider that the *facts* make any difference and that they are rulings as a sheer point of *law*. The two "New Mexico cases cited as supports have absolutely nothing to do with the "General Exception" for a spouse's "community property" interest (App. 5). Therefore, the Opinion ruled in pure form on the applicability the "General Exception" exclusion. There are "exclusions" in the Policy (App. 9, 10) which are separate from the "General Exception", and yet the Memorandum uses the General Exception as to a "spouse" as the only means of "excluding" the named insured, Lloyd

Hurley (App. 5) of necessity this implied that the Memorandum had excluded the "spouse", which in this case was the wife, Zenobia.

Therefore, the New Mexico *Court of Appeals ruled that the General Exception is valid* (App. 12, 13) *against the wife as spouse of the named insured.* (Emphasis added.)

If the General Exception had not been applied to the wife as valid, it could not suddenly become valid as to the husband, the named insured (App 8).

The Unconstitutionality of the "General Exception" (App. 12, 13) *Can Now be Presented to U.S. Supreme Court Jurisdiction in Pure Form.*

The Opinion does not expressly rule on the Constitutionality of the "General Exception" as regards Zenobia Hurley, the spouse, rather it ostensibly denied her contract claims on "res judicata" and "collateral estoppel" grounds; however, of necessity *the Opinion ruled on the "General Exception"* (App. 4, 5) in denying Lloyd Hurley's Policy claims and thereby ruled against Zenobia's claim that the "General Exception" was an "unconstitutional" "discrimination" in violation of New Mexico's Equal Rights Amendment and the 14th Amendment. The fact that Zenobia Hurley raised this Constitutional issue is admitted by the Opinion where her constitutional claims are expressly set out therein (App. 4).

Petitioners will show with separate treatment that "res judicata" and "collateral estoppel" used by the Memorandum were the purpose of obscuring their ruling on gender based discrimination."

Labeling the Opinion, "Memorandum" (App. 2) invokes U.S. Supreme Court Jurisdiction in an additional way. Under Rule 7, Misc. Rules, Judicial Vol. 1, Pam-

phlet 9, NMSA 1978, set out, App. 49, it constitutes a declaration that their Constitutional decision on "General Exception" was not to be considered a "precedent". Obviously this makes the Petitioners subjects of "discrimination" by the N. M. Court in violation of the 14th Amendment "due process" and "equal protection" clauses. New Mexico passed in 1972 its own Equal Rights Amendment which prohibits discrimination based on sex, Art. II, Sec. 18. The Constitutional argument is simply that "spouse" is a sex identifying term, absolutely. Therefore, Zenobia as the spouse of the named insured is discriminated against and *deprived of coverage based on sex.* If the named insured is the wife, her spouse, the husband, would also be discriminated against and denied coverage based on the fact that he was the husband, a man, *Wengler,* supra. There is nothing more Petitioners can say. It is obviously and completely a denial of coverage, a refusal to pay, a means of saving a Title Company money based entirely on sex discrimination. Sec. 40-3-7 NMSA in speaking of the Community Property Act says "The purpose of the Community Property Act of 1973 is to comply with the provisions of Section 18 of Article II of the Constitution of New Mexico, as it was amended in 1972 and became effective on July 1, 1973, by making the provisions of the Community Property law of New Mexico apply equally to all persons regardless of sex." Petitioners submit that the General Exception (App. 12, 13) is clearly unconstitutional under the Federal Constitution (14th Amendment) and the New Mexico Constitution (Art. II, Sec. 18) and New Mexico Community Property Law (NMSA 1978, 40-3-6 thru 40-3-17).

Since the State acting through the New Mexico Court of Appeals declared to the contrary, the 14th

Amendment prohibitions against "no state" confer Federal Jurisdiction and extends that Jurisdiction to the U. S. Supreme Court, 28 USC 1257 (3). The New Mexico Equal Rights Amendment qualifies the Petitioner for Federal protection since the State of New Mexico acting through its Court of Appeals has discriminated against the "spouse", which deprives the spouse of the "equal protection" of the laws of the State of New Mexico. To overcome such discrimination is the whole avowed purpose of 14th Amendment U. S. Constitution. Sec. 2 provides "that an aggrieved party shall have the absolute right to one appeal." New Mexico established the Constitutional right. The 14th Amendment can be used to secure it. A Memorandum Opinion, which does not qualify under Rule 7, is no appeal at all and Art VI, Sec. 2, which guarantees "the absolute right to one appeal" has been violated. The denial by the State of its own Constitutional guarantees to an aggrieved Party is a 14th Amendment violation.

Jurisdiction in the Court based on a Federal issue has long been established. In stating the above we are aware that Certiorari is not always granted, but a Federal issue is certainly present and Petitioners earnestly request the Court to consider that the Federal issue presented to th Court involve issues of such importance for the benefit of the Constitutional rights of New Mexico citizens as to merit relief.

The "Memorandum Opinion" Is Unconstitutional, 14th Amendment. It Violates and Contradicts New Mexico Constitution's Absolute Right to One Appeal, Art. VI, Sec. 2, N. M. Const., NMSA 1978, Vol. 1, and Discriminated against Petitioners.

In *Douglas v. California*, 372 U. S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814, this Court condemned a state appellate

procedure which denied appellate counsel to an indigent saying it "would seem to be a discrimination as invidious as that condemned in *Griffin v. Illinois.*"

The 14th Amendment "due process" does not require a state to grant an appeal, however, "once it is extended, there may not be imposed upon it discriminatory limitations which violate the right to equal protection of the laws." *In Re Brown,* 439 Fed. 2d 47, 51, *Griffin v. Illinois,* 351 U. S. 12, 100 L. Ed. 2d 891, 76 S. Ct. 585, 55 A. L. R. 2d 1055, held that a state may not grant appellate review in such a way as to discriminate against some convicted defendants an account of their poverty.

"Discrimination" appears in both the "Exception" by the Respondent in their Title Policy *and* in the appeal by the New Mexico Court of Appeals. The latter "discrimination" makes a distinction between the appellant in the instant case and other appellants. The appeal "discrimination" herein is not of the type frequently raised, e. g., failure to accord a full hearing, nor does it involve a summary disposition of an appeal as a frivolous appeal.

No language in the Opinion so indicates. There is nothing but a "flagged" indication that this case is not a precedent to be followed. "Memorandum Opinion" with no explanation as why this is so, shows a "discrimination". In the language of *Univ. Calif. Regents v. Bakke,* 438 U. S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978), discrimination for its own sake or discrimination as a means of protecting "discrimination".

The policy "Exception" "discrimination" runs against New Mexico Constitution, Equal Rights Amendment, Art. II, Sec. 18, which says "Equality of Rights under law should not be denied on account of sex of any person", Volume 1, NMSA (1978). The "discrimination" against Mrs.

Hurley in the appeal process is a procedural measure having as its resultant the protection of the "policy discrimination". Art. VI, Sec. 2 of the New Mexico Constitution, grants an "absolute right to one appeal." As stated *In Re Brown*, supra, the 14th Amendment then applies to give U. S. Constitution protection against discrimination. See also *Burns v. Ohio*, 360 U. S. 252, 3 L. Ed. 2d 1209, 79 S. Ct. 1164, which asserts the fundamental principle that once a State grants the Appeal, the Federal Constitution can be applied. The State creates and functions as the appellate machinery and the actions therein qualify for 14th Amendment protection. In *Williams v. Oklahoma*, 395 U. S. 458, 83 L. Ed. 2d 440, 89 S. Ct. 1818, an "unreasoned" distinction between types of appellants violates the 14th Amendment. *Mayer v. Chicago*, 404 U. S. 189, 30 L. Ed. 2d 372, 92 S. Ct. 410, condemned a distinction between appellants as a violation of the 14th Amendment.

Petitioner's contention about a 14th Amendment violation in and through the Appellate process should be viewed as part of their more fundamental claim that there was an invidious "discrimination" based on sex. The 14th Amendment violation in the appeal Memorandum and its use was intended to cover up a real denial of discrimination based on sex in the Policy Exception.

The Opinion Violates New Mexico Rule 7 Defining Memorandum Opinion and Is in Itself a Violation of "Equal Protection".

Its Intended Use Is to Restrict the Opinion's Unconstitutional Endorsement of the Discrimination Policy to These Petitioners, Thereby Violating "Equal Protection", 14th Amendment.

New Mexico's (App. 49) Court Rule on Memorandum Opinion NMSA 1978 Judicial Volume 1, Judicial Pamphlet 9, Rule 7 entitled "Opinions in Civil Cases", subsection (a)

says: "Disposition . . . by memorandum opinion does not mean that the case is considered unimportant. It does mean that no new points of law, making the decision of value as a precedent, are involved". The foregoing merely states a conclusion that should be attached to the label "Memorandum Opinion". It does not immunize the memorandum from the 14th Amendment scrutiny. Looking further to Rule 7 lays down (5) "circumstances" which permit the Memorandum Opinion. Of decisive importance is that the Memorandum Opinion itself does not seek authority from any one of the five "circumstances". The five "circumstances" are exclusive of any other "circumstances". Examining the exclusive "five" one by one, we find that as to (1) no opinion is cited which disposes of the issues. If Art. 11, Sec. 18 of the New Mexico Constitution prohibiting "discrimination" based on sex; or mandatory "due process" and equal protection of the laws under Art. 11, Sec. 18 is no longer controlling under New Mexico law, none are cited.

The Opinion comes full circle in a complete contradiction. Rule 7 (c) says that the Opinion "shall not be cited as precedent". If the Opinion merely echoes a former precedent, why would it not be published and cited as a precedent? The only meaning to Rule 7 is that the Court does not want the Opinion cited as precedent, otherwise there is no point in adding the word "memorandum" to the Opinion. There is no concrete reason why the case receives a "memorandum" treatment except that the Court elected to so label it and thereby avoid it as a "precedent". Rule 7(b) has a justification "the presence or absence of substantial evidence", thus could not apply since it was a Summary Judgment in the Court below and in effect a Summary Judgment by the Court of Appeals.

"Substantial evidence" only applies to a trial which was denied to Petitioners thereby violating their New Mexico Constitution right to a jury trial. Rule 7(b) 3 authorizes the Memorandum when the issues are already decided by statute or rules of Court. The most important statute in New Mexico involved in this case are the ones requiring husband and wife real estate to be community property and prohibiting any taking away of the spouse's real property except via a signed separation agreement, NMSA 1978, Sec. 40-3-1, which the records in this case shows was never done and which the record also shows that the Title Companies acknowledged their omission by writing on their file "Too Late". (App. 45). New Mexico has always been a "community property" community. NMSA 1978 Sec. 40-3-6, 7, 8. A New Mexico case, *Hollingsworth v. Hicks*, 57 NM 336, 258 P. 2d 724 (1953) says "The status of real property is governed in this state by statute. The property owned by either spouse before marriage or acquired after marriage by gift, bequest, devises descent . . . is the separate property of that spouse. . . . all other property acquired by either husband or wife or both after marriage is community property."

See also *Barnett v. Naglewood*, 28 NM 312, 211 P. 601, and on unbroken line of New Mexico authority. Viewing the requisites of Rule 7 b (2) & (3) we find evidence that the Title Company knew that Lloyd Hurley was married and knew that the Title to the land *was* not in him "as his sole and separate property" (App. 46) and knew that it was equally Zenobia's, his wife, and yet the Title Co. intentionally falsified the title and insured it (App. 32) as a falsified title and kept the transaction secret as to her (App. 46). The only basis for a "Memorandum Opinion" would have been to overrule the lower Court and

grant a Summary Judgment to the Plaintiff, Zenobia Hurley, allowing her coverage on the policy as a matter of law since all prior decisions so held.

The same is true for the Plaintiff, her then husband, Lloyd Hurley. The only way Zenobia, as the community owner, could be legally dispossessed was to apply the "Exception" which would have violated New Mexico Equal Rights Amendment, Art. 11, Sec. 18.

The Memorandum Opinion cites the divorce case of *Hurley v. Hurley,* 94 NM 641, 615 P. 2d 256. The Memorandum correctly says the highest Court decided that the property was other than as stated in the recitals in the Policy by the Title Company. Every case from New Mexico had always so held based on the interpretation of community property statute. "Issues" as defined in Rule 7B (3) were absolutely settled by a statute NMSA 40-3-8 B, but settled in Zenobia's favor. How her community ownership justifies a Memorandum Opinion endorsing a Summary Judgment against her is simply contradictory. The issues were answered by "statute" but in her favor.

This Memorandum Opinion is a "state" document and proceeding within the scope of the 14th Amendment. Its lack of grounds and failure to try to state any under N. M. Misc. Rule 7, supra, is clear evidence of a denial of "due process" and "equal protection" of the 14th Amendment by and through the Memorandum Opinion.

In summary, Zenobia was a community owner of ½ of the property insured. Title Company knew she was a community owner. Title Company insured the whole property including hers. They charged a premium measured by the whole tract including her share. The highest Court in the State said she was a community owner. There were intentional misstatements of Title by

the Title Companies with full knowledge of their falsity (App. 5). The Title Company could not blame her for misleading them or in any way waiving any right since the Title Company kept the entire transaction secret as to her. Centering on Rule 7 and the Memorandum Opinion for the moment—where is there any motive except that the Court did not want it to be cited as a precedent or published. Rounding out the lost two requisites for a Memorandum Opinion, it obviously was prejudicial to the Petitioner, and the issues presented by her certainly have merit (App. 31-34, 49).

Petitioners were the Victims of Summary Judgments Unconstitutionally Applied.

The Opinion does not discuss this issue at all. There are numerous Summary Judgment appeals in New Mexico, all the subject of regular Opinions. The established law is that it is a drastic remedy, therefore, to affirm a Summary Judgment calls for close analysis of all facts and a sense of restraint because the litigants are deprived of a trial by a Court or Jury. Their Constitutional Rights are affected.

This is overwhelmingly clear as to Lloyd Hurley's claim for breach of contract and both Petitioners' numerous claims for torts and estoppel. The Summary Judgment treatment is incredible in light of existing New Mexico law. No attempt is made to analyze the facts which violate all New Mexico precedents. *Gallegos v. Wallace,* 74 NM 760, 398 P. 2d 982; *Reed v. Fish,* 74 NM 45, 390 P. 2d 283; *Johnson v. J. S.,* 81 NM 42, 462 P. 2d 627; *Templin v. Mt. Bell,* 97 NM 699, 643 P. 2d 263 (1982).

The Memorandum Opinion says "Dr. Hurley was the person who told defendants how to list the property. He cannot now profit from his own action," citing a criminal

case. This summarily disposes of meetings, closings, discussion, involving representatives of Title Companies, lawyers, bankers, not Mrs. Hurley, of course.

As regards the husband's, Lloyd Hurley, participation in the real estate transaction, the only facts in the appeal are Paragraphs 10 and 11 of the Complaint (App. 32, 33), which says that he "relied upon the defendants to correctly state the legal titles to the purchased property", also the Title Companies' agent, Tomie Garcia, who handled the transaction (App. 45, 46, 47), whose sworn testimony was before the New Mexico Court of Appeals, does not support the Opinion's factual conclusion and implications that "Dr. Hurley was the person who told defendants how to list the property" (App. 5). The Opinion absolves the Title Companies of liability based on the above assertion. Summary Judgment can never be granted where the Appellate Court makes its own factual conclusion. Even if Dr. Hurley said he wanted a sole and separate title, which facts were not before the Court (App. 32, 33, 47) still to say that when the Title Companies intentionally falsified the Title and recorded the false Title on New Mexico Public Records that this is defense against the named insured merely because he wanted Title on her estate, is simply destructive of the Title industry and the approval of a public fraud.

The Opinion reiterates its false conclusions of fact and law by saying (App. 6), "The ownership designation was as requested by Dr. Hurley", and then makes the incredible statement, "We can find no authority, nor have we been cited to any, that imposes a duty on the Title Company to conduct an investigation to see how title should vest in a purchaser." This appellate *exoneration* eliminates the insuring agreement in the Policy, which says

the Title Company is liable "by reason of: 1. Title to the estate or interest described in Schedule A being vested otherwise than as stated therein" (App. 9).

The false Title recitals appear on Schedule A (App. 8), and the Title Company representative said that they knew that the title was other than stated in Schedule A (App. 45, 46). With this knowledge of falsity, the Court of Appeals' assertion that the Title Company has no duty to investigate what the title was, became moot. Obviously there was an investigation so the Opinion endorses not an omission but an intentional falsification (App. 45, 46). The Opinion correctly says, "We can find no authority" (App. 6) for their ruling. If one existed, it would make the Title Industry per se a fraudulent one."

Every legal conclusion in the Memorandum Opinion is equally erroneous. All of this was a subtle way of hiding the violation of Constitutional protection against discrimination presented to the New Mexico Court of Appeals, and to which the Court erroneously said, "We do not decide these claims" (App. 4).

In summation we submit that the use of a Memorandum Opinion to affirm a Summary Judgment is a clear violation of New Mexico Rule 7 and a violation of the 14th Amendment (App. 49).

This Opinion could not possibly be published without overturning all existing precedents, so it is labeled as a non-precedent Memorandum, meaning that these appellants are denied the "equal protection of the laws." New Mexico Const. Art. II, Section 18; 14th Amendment.

The Memorandum Used "Res Judicata" and "Collateral Estoppel" to Obscure Its Unconstitutional Endorsement of the Policy Discrimination in the General Exception.

Those Doctrines Are Totally Unapplicable Herein According to Direct Authority in New Mexico and Anywhere Else.

The Memorandum Opinion (App. 4) says that the doctrine of "res judicata" and "collateral estoppel" by the U. S. District Court (App. 3, 43, 44, 47, 48, 49) in a suit solely by Zenobia Hurley and solely against Commonwealth Title bars the contract claims of Zenobia Hurley in this State Court action where she and her former husband sue both Title Companies (App. 30). The Memorandum Opinion claims that the failure of Zenobia to appeal her contract claim when she appealed to the 10th Circuit in *Zenobia Hurley v. Commonwealth*, 647 F. 2d 1055, "bars Mrs. Hurley's contract claim" (App. 3, 4), the Memorandum Opinion says that the original Complaint in U. S. District Court included "contract claims and tort claims" (App. 3). When the first Commonwealth Motion for Dismissal in Federal Court, considered a Motion for Summary Judgment, was granted with leave to file an amended Complaint, the amended Complaint did not include the contract claims (App. 3), therefore, when the Summary Judgment was granted as to the amended Complaint, the Appeal to the 10th CCA could not have included the contract claims of the original Complaint (App. 4, 48); however,

The Fact That There Was Never A Judgment By The U. S. District Court On The Threatened Dismissal Of The Original Complaint Prevents "res judicata" Of "collateral estoppel" From Applying.

The Absolute for either of those doctrines is a Judgment disposing of the issues. *Carroll v. Bunt*, **50 NM 127, 172 P. 2d 116 has the identical situation and ruled "res judicata" was not applicable, and says P. 131, "Defendants overlook the fact that the order sustaining the Mo-**

tion to Dismiss allowed Plaintiff twenty days in which to further plead and on exception to the ruling of the Court.

"It was not a final judgment and therefore not res judicata." Sec. 41, Restatement of the Law of Judgments.

There is other New Mexico direct authorities against the Memorandum ruling on "res judicata" and "collateral estoppel" in *Albright v. Albright,* 21 NM 606, 157 P. 167 (1916) which says, p. 621, "the leading case upon the point that a judgment is necessary to constitute res judicata is that of *Oklahoma City v. McMaster,* 196 U. S. 533, 25 S. Ct. 325, 49 Fed. 587, and the Court there says: "It is plain that there has been no formal judgment entered in the case and that two separate documents, filed in different clerks' offices, cannot be pieced together and made a formal and complete judgment. Without a formal judgment, the plea of res judicata has no foundation." *Albright v. Albright,* supra, has identical facts to ours in that the amended Complaint did not carry forward all matters contained in the original Complaint and there was a judgment for defendant on the Amended Complaint. Defendant then contended res judicata as to the abandoned first Complaint issues. The New Mexico Supreme Court said that, p. 261, "a judgment for the defendant dismissing a cause on the merits, is res judicata only as to such matters that were carried forward into her amended or supplemental Complaint. This being true, the only matter litigated in the Insurance Company case was as to whether a designated tract of real estate had been conveyed in fraud of the rights of the creditors, and hence such judgment would only be res judicata upon that question." *C & H Const. Co. v. Citizens Bank,* 93 NM 150, 161, 597 P. 2d 1190 (1979), reaffirmed *Albright v. Albright,* supra, p. 161, saying, "It will be established that the doc-

trines of res judicata and collateral estoppel apply only to final judgments." See also *Chronester v. State Farm,* 67 NM 170, 179, 180, 353 P. 2d 1059, which denied "res judicata" applicability saying a prior ruling was only "an interim area" saying "the trial Court by retaining jurisdiction, in effect, denied the first judgment status of finality and accordingly it was not applicable . . . and appellee's contention that the same are res judicata are not well founded." Albright goes even further and more closely in point by holding that "It cannot be claimed that the report of the referee finding that the property mentioned in the original Complaint was the separate property of the wife, which report was not carried into the judgment was "res judicata". *Oklahoma City v. McMaster,* supra, is quoted as the leading case on that point.

As to the First Dismissal, March 23, 1979 (App. 48), the U. S. District Court said it *would* dismiss the entire Complaint unless an "Amended Complaint" was filed in fifteen days. No order or judgment was ever entered on the March 23 Order and after the Amended Complaint was filed, the Court, on August 22, said "Summary Judgment is entered for the Defendant and the Plaintiff's Motion for Summary Judgment is denied and their action is dismissed" (App. 48). The foregoing was the only Judgment entered in that case and it was the Judgment appeals (App. 48, 49).

All the 10th Circuit said was that the action was "premature". It did not discuss or rule on the so-called contract claim and did not make a special ruling eliminating them from the "prematurity" ruling, *Zenobia Hurley v. Commonwealth,* supra. The J. Bratton actual Dismissal did not say "with prejudice" and when we superimpose the "prematurity" ruling of the Court of Appeals on a 'Dis-

missal" below, the clear result is that the case by Zenobia Hurley falls into the ruling on "prematurity", which is never "res judicata" or "collateral estoppel", 46 Am. Jur. 2d § 499.

An indication that a Judgment will be entered is not sufficient to make a res judicata, *Albright v. Albright*, supra. A judgment is essential for res judicata and said Judgment must be in writing, 46 Am. Jur. 2d § 439. There is no basis for the application of the doctrine. "A former adjudication is regarded as not being upon the merits, within the scope of the doctrine of res judicata . . . where it was based upon the fact that the action was prematurely brought as where the obligation was not due, or the time of performance of the contract had not arrived, when the action was brought", 46 Am. Jur. 2d § 499, supra.

Petitioners have developed New Mexico law on "collateral estoppel" and "res judicata" because the "Memorandum Opinion" used that as a means of bypassing Zenobia's claim to an Unconstitutional discrimination in the General Exception (App. 12). Therefore, whether the Memorandum has any support in New Mexico law could be weighty in this Court's ruling on this Petition. The use of a *no precedent* "Memorandum Opinion" is related. Clearly the use of "res judicata" and "collateral estoppel" is erroneous based on controlling New Mexico case law, supra. Rule 7, Judicial Vol. I, Pamphlet 9 (App. 48), which governs "Memorandum Opinion" authorizes one of the issues have been decided by the Supreme Court or Court of Appeals. Our exposure of New Mexico case law shows that the "Memorandum Opinion" cannot be used for "res judicata" and "collateral estoppel" because it overturns those doctrines in New Mexico case history.

Therefore, the use of the "Memorandum Opinion" is false and a violation of "due process" and "equal protection", 14th Amendment. It is likewise a violation of New Mexico's Equal Rights Amendment, Art. 2, Sec. 18, because it rules against Zenobia on her constitutional attack upon the "General Exception" discrimination, which is the real constitutional issue involved. The Memorandum seeks to divert attention onto a point of law and then avoid 14th Amendment scrutiny of the Constitutional discrimination.

Therefore, the false use of the Memorandum Opinion as exposed by clear New Mexico law against the Opinion's ruling on "res judicata" and "collateral estoppel" is a means to an end. Subtle methods for 14th Amendment avoidance are historically not infrequent. This is absolutely one of them. Petitioner would like to turn this subtle evasion into a vigorous request to grant this Petition. This Petitioner is limited as to space but Petitioner believes their detailed exposure of New Mexico law is the key to what was intended by the Memorandum to be a denial of New Mexico's *own* Equal Rights Amendment. The 14th Amendment does not permit such an evasion and a denial by the "State".

Respectfully submitted,

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APPENDIX

No. 5976

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

ZENOBIA E. HURLEY and LLOYD A. HURLEY,

Plaintiffs-Appellants,
and Cross-Appellees,

vs.

ALBUQUERQUE TITLE COMPANY, INC., a New Mexico corporation, and COMMONWEALTH LAND TITLE INSURANCE COMPANY, a Pennsylvania corporation,

Defendants-Appellees,
and Cross-Appellants.

(Filed July 27, 1983)

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY

PHILIP R. ASHBY, Judge

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Attorneys for Defendants

MEMORANDUM OPINION

HENDLEY, Judge.

Plaintiffs brought this action for breach of contract and several negligence theories arising out of a contract for title insurance issued by defendants. Defendants filed a motion to dismiss. The trial court treated this as a motion for summary judgment, and dismissed the contract claims with prejudice and the tort claims as premature. Plaintiffs appeal the dismissal and defendants cross-appeal, contending the tort claims should also have been dismissed with prejudice.

In December, 1977, Albuquerque Title Company, agent for Commonwealth Land Title Insurance Company, was presented with a purchase agreement dated December 5, 1977, between Tobruk Stables, Inc., as seller, and Lloyd A. Hurley, M. D., a married man, trading in his sole and separate estate, as purchaser, providing for the sale and purchase of real estate. A warranty deed was executed conveying title to Lloyd A. Hurley, M. D., a married man, trading in his sole and separate estate. The purchase was secured by a mortgage to the First National Bank. Mrs. Hurley did not sign the note or mortgage to First National Bank.

An owner's policy of title insurance was issued to Lloyd A. Hurley, a married man, as his sole and separate estate. A mortgagee's policy of title insurance was issued to First National Bank designating the fee owner of the real estate in the same manner as the owner's policy.

Dr. Hurley filed a divorce action the next day. The trial court in the divorce case ruled that Tobruk Stables

was community property, that each are entitled to a one-half interest therein, and that they are equally responsible for the obligations against it. Subsequently, the New Mexico Supreme Court affirmed the trial court's ruling. *Hurley v. Hurley*, 94 N. M. 641, 615 P. 2d 256 (1980).

On September 15, 1978, Mrs. Hurley filed a complaint against Commonwealth in the United States District Court for the district of New Mexico, asserting several contract claims and tort claims arising in connection with the Tobruk Stables transaction. Commonwealth filed a motion to dismiss, which was treated as a motion for summary judgment. The motion was granted with leave to file an amended complaint. The amended complaint dropped the contract claims. Commonwealth's motion to dismiss the amended complaint was also granted. The court issued a memorandum opinion of which we take judicial notice. NMSA 1978, Civ. P. R. 44(a)(3). On appeal, the Tenth Circuit Court of Appeals affirmed, stating that the tort claims were not ripe for adjudication. Mrs. Hurley did not appeal the dismissal of the contract claims and they were not addressed in the opinion of the Tenth Circuit. *Hurley v. Com. Land Title Ins. Co.*, 647 F. 2d 1055 (10th Cir. 1981). Mrs. Hurley's petition for writ of certiorari was denied by the Supreme Court of the United States.

On December 11, 1981, Mrs. Hurley filed the present action in the court below. Dr. Hurley was joined as an involuntary plaintiff, but later became a voluntary plaintiff.

Mrs. Hurley—Contract Claims

Plaintiffs' attack on the dismissal as to Mrs. Hurley claims 1) the dismissal is unconstitutional discrimination in violation of New Mexico's Equal Rights Amendment; 2) the "community property exclusion" portion of the contract is unconstitutional; and 3) the dismissals violate the plaintiffs' constitutional right of access to the courts.

We need not decide these claims. The summary judgment was proper. Mrs. Hurley's claim is barred by the doctrine of collateral estoppel. *See Romero v. State*, 97 N. M. 569, 642 P. 2d 172 (1982); *El Paso Natural Gas Co. v. Kysar Ins. Agcy., Inc.*, 93 N. M. 732, 605 P. 2d 240 (Ct. App. 1979). Her contract claims were actually and necessarily decided in the federal court.

Further, since the federal court subject matter, the cause of action, the parties and the quality of the identities were the same, the doctrine of res judicata applies. This also bars Mrs. Hurley's contract claims. *See El Paso Natural Gas Co., supra.*

Dr. Hurley—Contract Claims

Summary judgment was proper. Community property claims were excluded under Schedule B of the contract, which states:

> This policy does not insure against loss or damage by reason of the following:
>
> GENERAL EXCEPTIONS:
>
> . . . .

5. community property, dower, curtesy, survivorship, or homestead rights, if any, of any spouse of the insured.

The rights of the parties are fixed by the contract, and the particular risk being excluded by the contract, there is no liability under the contract. *See Horn v. Lawyers Title Insurance Corporation,* 89 N. M. 709, 557 P. 2d 206 (1976); *Devlin v. Bowden,* 97 N. M. 547, 641 P. 2d 1094 (Ct. App. 1982).

Further, the contract contains an exclusion of coverage for any defects, liens, encumberances, etc., which do not result in loss or damage to the insured. A title insurance policy is a policy of indemnification and not one that guarantees title to the real estate. *Diversified Mortg. Investers v .U. S. Life Ins. Co.,* 544 F. 2d 571 (2nd Cir. 1976); *Horn, supra*; *Devlin, supra.*

Also, Dr. Hurley was the person who told defendants how to list the property. He cannot now profit from his own action. *See State v. Sedillo,* 81 N. M. 47, 462 P. 2d 632 (Ct. App. 1969).

Tort Claims

The complaint appears to make claims for negligence, negligence per se, gross negligence, negligent misrepresentation, fraud, and slander of title. The negligence claims are based on the company's statement of title that Tobruk Stables vested in Dr. Hurley as his sole and separate property. The fraud and negligent misrepresentation claim is basically that the title company intentionally falsified public records by virtue of the ownership designation in the deed and mortgage, and failed to notify Mrs. Hurley of the transaction.

The ownership designation was as requested by Dr. Hurley. We can find no authority, nor have we been cited to any, that imposes a duty on the title company to conduct an investigation to see how title should vest in a purchaser. A title policy is a contract and, as such, its terms establish the duties and liabilities of the parties. *Horn, supra; Devlin, supra.* If Dr. Hurley did anything wrong in instructing the defendants on how title should vest, the Supreme Court straightened the matter out in *Hurley v. Hurley, supra.* The trial court should have dismissed the tort claims with prejudice.

We have considered plaintiffs' other arguments and find them without merit.

We affirm on the contract claims and remand on the tort claims for a correction of the judgment in conformity herewith. Plaintiffs are assessed appellate costs.

IT IS SO ORDERED.

/s/ William R. Hendley, Judge

WE CONCUR:

/s/ C. Fincher Neal, Judge
/s/ William W. Bivins, Judge

(Received September 18, 1983)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Thursday, September 15, 1983
No. 15099

ZENOBIA E. HURLEY, et al.,

Petitioners,

vs.

ALBUQUERQUE TITLE COMPANY,
INC., et al.,

Respondents.

PROCEEDING ON CERTIORARI

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is hereby denied.

IT IS FURTHER ORDERED that the Record in Cause No. 5976 is hereby returned to the Clerk of the Court of Appeals.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Monday, August 8, 1983

No. 5976
D.C. No. CV 81-08634

ZENOBIA E. HURLEY & LLOYD A. HURLEY,

Plaintiffs-Appellants,
and Cross-Appellees,

vs.

ALBUQUERQUE TITLE COMPANY, INC.,
a New Mexico corporation and

COMMONWEALTH LAND TITLE INSURANCE CO., a Pennsylvania corporation,

Defendants-Appellees,
and Cross-Appellants.

WILLIAM HENDLEY, Presiding Judge

WILLIAM BIVINS, C. FINCHER NEAL, Judges

In this cause, a motion for rehearing having been filed by APPELLANTS, and consideration having been had by all of the members of the original panel,

IT IS ORDERED that the motion for rehearing be DENIED.

/s/ William P. Hendley
Presiding Judge

POLICY OF TITLE INSURANCE

(LOGO)
(a stock company)

COMMONWEALTH LAND
Title Insurance Company
Philadelphia, Pennsylvania

Policy Number

101-319343

SCHEDULE A

Amount of Insurance: $131,000.00 File No. GF# 2245 tg

Premium: $658.30

Date of Policy: 13th day of December, 1977, at 3:21 PM.

1. Name of Insured:

   LLOYD A. HURLEY, a married man, as his sole and separate estate.

2. The estate or interest in the land described herein and which is covered by this policy is

   fee simple and is at Date of Policy vested in:

   LLOYD A. HURLEY, a married man, as his sole and separate estate.

3. The land referred to in this policy is described in the said instrument, is situated in the County of

   Bernalillo, State of New Mexico, and is identified as follows:

SEE ATTACHED EXHIBIT "A".

Countersigned: /s/ Jeff Thompson
Authorized Officer or Agent

American Land Title Association Owner's Policy 1970 Form B (Amended 10-17-70) Form 1005-6 Schedule A PA 10

COMMONWEALTH LAND TITLE INSURANCE COMPANY

OWNER'S POLICY OF TITLE INSURANCE

Subject To The Exclusions From Coverage, The Exceptions Contained In Schedule B And The Provisions Of The Conditions And Stipulations Hereof, Commonwealth Land Title Insurance Company, a Pennsylvania corporation, herein called the company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, and cost, attorneys' fees and expenses which the Company may become obligated to pay hereunder, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested otherwise than as stated therein;
2. Any defect in or lien or encumbrance on such title;
3. Lack of a right of access to and from the land, or
4. Unmarketability of such title.

In Witness Whereof, the Commonwealth Land Title Insurance Company has caused its corporate name and seal to be hereunto affixed by its duly authorized officers, the

Policy to become valid when Schedule A is countersigned by an authorized officer or agent of the Company.

Commonwealth Land Title Insurance Company

Attest:

/s/ Howard S. Schmidt
Secretary

By /s/ Fred B. Fromhold
President

(Corporate Seal)

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy:

1. Any law, ordinance or governmental regulation (including but not limited to building and zoning ordinances) restricting or regulating or prohibiting the occupancy, use or enjoyment of the land, or regulating the character, dimensions or location of any improvement now or hereafter erected on the land, or prohibiting a separation in ownership or a reduction in the dimensions or area of the land, or the effect of any violation of any such law, ordinance or governmental regulation.
2. Rights of eminent domain or governmental rights of police power unless notice of the exercise of such rights appears in the public records at Date of Policy.
3. Defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant; (b) not known to the Company and not shown by the public records but known to the insured claimant either at Date of Policy or at the date such claimant acquired an estate or interest insured by this policy and not disclosed in writing by the insured claimant to the Company prior to the date such insured claimant became an insured hereunder; (c) resulting in no loss or damage to the insured claim-

ant; (d) attaching or created subsequent to Date of Policy; or (e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the estate or interest insured by this policy.

American Land Title Association Owner's Policy 1970
Form B (Amended 10-17-70)

EXHIBIT "A"

A certain tract of land situate in School District No. 4, RANCHOS DE ALBUQUERQUE, Bernalillo County, New Mexico within Elena Gallegos Grant, being identified as Tract numbered 202-C-2, as shown on Middle Rio Grande Conservancy District Property Map No. 27, which is bounded as follows: On the North by land of/or formerly of Metcalf Agency or J. M. Julian; on the South by land of/or formerly of Presiliano Palladini and of Pietro Giacomelli; on the East by the Pueblo Lateral (also known as the Chamisal Lateral); on the West by Rio Grande Blvd. N.W., being more particularly described by metes and bounds survey as follows:

BEGINNING at the Southwest corner of the tract herein described, said Southwest corner being a point on the Easterly line of Rio Grande Blvd., N.W.; whence the protracted section corner common to Sections 19, 20, 29, and 30, Township 11 North, Range 3 East, NEW MEXICO PRINCIPAL MERIDIAN, bears N 81° 30′ 24″ W, 676.80 feet more or less distance (NOTE: the above described section tie is to be used for identification purposes only, and is not intended for field retracement;) then N 21° 26′ 00″ E, 71.00 feet distance along the Easterly line of Rio Grande Blvd.,

N.W., to a point; thence N 33° 22′ 00″ E, 53.00 feet distance continuing along the Easterly line of Rio Grande Blvd., N.W., to the Northwest corner of the tract herein described; thence S 80° 39′ 22″ E, 1042.99 feet distance to the Northeast corner of the tract herein described; thence S 40° 27′ 30″ W, 177.27 feet distance to the Southeast corner of the tract herein described; then N 80° 48′ 30″ W, 334.80 feet distance to a point; thence N 09° 37′ 00″ E, 40.04 feet distance to a point; thence N 81° 06′ 00″ W, 653.48 feet distance to the Southwest corner and place of beginning of the tract herein described.

Policy No. 101-353343

File No. GF# 2245 tg

SCHEDULE B

This policy does not insure against loss or damage by reason of the following:

GENERAL EXCEPTIONS:

1. Rights or claims of parties in possession not shown by the public records.
2. Easements, or claims of easements, not shown by the public records.
3. Encroachments, overlaps, conflicts in boundary lines, shortages in area, or other matters which would be disclosed by an accurate survey and inspection of the premises.
4. Any lien, claim or right to a lien, for services, labor or material heretofore or hereafter furnished, imposed by law and not shown by the public records.
5. Community property, dower, curtesy, survivorship, or homestead rights, if any, of any spouse of the insured.

6. Any titles or rights asserted by anyone including, but not limited to, persons, corporations, governments, or other entities, to lands comprising the shores or bottoms of navigable streams, lakes, or land beyond the line of the harbor or bulkhead lines established or changed by the United States Government.

7. Unpatented mining claims, reservations or exceptions in patents or in acts authorizing the issuance thereof, water rights, claims or title to water.

8. Taxes or assessments which are not shown as existing liens by the public record.

SPECIAL EXCEPTIONS:

9. Taxes for the year 1978, and thereafter.

10. Easements recorded of record.

11. Any and all rights, liens, claims, or equities in favor of the Middle Rio Grande Conservancy District, which may affect the insured premises.

12. MORTGAGE executed by LLOYD A. HURLEY, a married man, as his sole and separate estate, to FIRST NATIONAL BANK IN ALBUQUERQUE, dated December 13, 1977, filed for record December 13, 1977 at 3:21 P.M., as Document No. 77-77465, records of Bernalillo County, New Mexico, securing the sum of $130,000.00.

13. Any possible assessments for paving, sewer and water extensions which are or might be a lien by law, but have not yet been filed for record in the office of the County Clerk of Bernalillo County, New Mexico.

American Land Title Association Owner's Policy 1970
Form B (Amended 10-17-70) Form 1005-21 Schedule B

Original

CONDITIONS AND STIPULATIONS

1. Definition of Terms

The following terms when used in this policy mean:

(a) "insured": the insured named in Schedule A, and, subject to any rights or defenses the Company may have had against the named insured, those who succeed to the interest of such insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors.

(b) "insured claimant": an insured claiming loss or damage hereunder.

(c) "knowledge": actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of any public records.

(d) "land": the land described, specifically or by reference in Schedule A, and improvements affixed thereto which by law constitute real property: provided, however, the term "land" does not include any property beyond the lines of the area specifically described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(f) "public records": those records which by law, impart constructive notice of matters relating to said land.

2. Continuation of Insurance After Conveyance of Title

The coverage of this policy shall continue in force as of Date of Policy in favor of an insured so long as such insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from such insured, or so long as such insured shall have liability by reason of covenants of warranty made by such insured in any transfer or conveyance of such estate or interest: provided, however, this policy shall not continue in force in favor of any purchaser from such insured of either said estate or interest or the indebtedness secured by a purchase money mortgage given to such insured.

3. Defense and Prosecution of Actions — Notice of Claim to Be Given By an Insured Claimant

(a) The Company, at its own cost and without undue delay, shall provide for the defense of an insured in all litigation consisting of actions or proceedings commenced against such insured, or a defense interposed against an insured in an action to enforce a contract for a sale of the estate or interest in said land, to the extent that such litigation is founded upon an alleged defect, lien, encumbrance, or other matter insured against by this policy.

(b) The insured shall notify the Company promptly in writing (i) in case any action or proceeding is begun or defense is interposed as set forth in (a) above, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest, as insured, is rejected as unmarketable. If such prompt notice shall

not be given to the Company, then as to such insured all liability of the Company shall cease and terminate in regard to the matter or matters for which such prompt notice is required: provided, however, that failure to notify shall in no case prejudice the rights of any such insured under this policy unless the Company shall be prejudiced by such failure and then only to the extent of such prejudice.

(c) The Company shall have the right at its own cost to institute and without undue delay prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest as insured, and the Company may take any appropriate action under the terms of this policy, whether or not it shall be liable thereunder, and shall not thereby concede liability or waive any provision of this policy.

(d) Whenever the Company shall have brought any action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any such litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(e) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding the insured hereunder shall secure to the Company the right to so prosecute or provide defense in such action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of such insured for such purpose. Whenever requested by the Company, such insured shall give the Company all reason-

able aid in any such action or proceeding, in effecting settlement, securing evidence, obtaining witnesses, or prosecuting or defending such action or proceeding, and the Company shall reimburse such insured for any expense so incurred.

4. Notice of Loss — Limitation of Action

In addition to the notices required under paragraph 3(b) of these conditions and Stipulations, a statement in writing of any loss or damage for which it is claimed the Company is liable under this policy shall be furnished to the Company within 90 days after such loss or damage shall have been determined and no right of action shall accrue to an insured claimant until 30 days after such statement shall have been furnished. Failure to furnish such statement of loss or damage shall terminate any liability of the Company under this policy as to such loss or damage.

5. Options to Pay or Otherwise Settle Claims

The Company shall have the option to pay or otherwise settle for or in the name of an insured claimant any claim insured against or to terminate all liability and obligations of the Company hereunder by paying or tendering payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred up to the time of such payment or tender of payment, by the insured claimant and authorized by the Company.

6. Determination and Payment of Loss

(a) The liability of the Company under this policy shall in no case exceed the least of:

(i) the actual loss of the insured claimant; or

(ii) the amount of insurance stated in Schedule A.

(b) the Company will pay, in addition to any loss insured against by this policy, all costs imposed upon an insured in litigation carried on by the Company for such insured, and all costs, attorneys' fees and expenses in litigation carried on by such insured with the written authorization of the Company.

(c) When liability has been definitely fixed in accordance with the conditions of this policy, the loss or damage shall be payable within 30 days thereafter.

Conditions and Stipulations Continued Inside Cover
B 1005 7

CONDITIONS AND STIPULATIONS

(Continued)

7. Limitation of Liability

No claim shall arise or be maintainable under this policy (a) if the Company, after having received notice of an alleged defect, lien or encumbrance insured against hereunder, by litigation or otherwise, removes such defect, lien or encumbrance or establishes the title, as insured, within a reasonable time after receipt of such notice; (b) in the event of litigation until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom adverse to the title, as insured, as provided in paragraph 3 hereof; or (c) for liability voluntarily assumed by an insured in settling any

claim or suit without prior written consent of the Company.

8. Reduction of Liability

All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto. No payment shall be made without producing this policy for endorsement of such payment unless the policy be lost or destroyed in which case proof of such loss or destruction shall be furnished to the satisfaction of the Company.

9. Liability Noncumulative

It is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring either (a) a mortgage shown or referred to in Schedule B hereof which is a lien on the estate or interest covered by this Policy, or (b) a mortgage hereafter executed by an insured which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy. The Company shall have the option to apply to the payment of any such mortgages any amount that otherwise would be payable hereunder to the insured owner of the estate or interest covered by this policy and the amount so paid shall be deemed a payment under this policy to said insured owner.

10. Apportionment

If the land described in Schedule A consists of two or more parcels which are not used as a single site, and a loss

is established affecting one or more of said parcels but not all, the loss shall be computed and settled on a pro rata basis as if the amount of insurance under this policy was divided pro rata as to the value on Date of Policy of each separate parcel to the whole, exclusive of any improvements made subsequent to Date of Policy, unless a liability or value has otherwise been agreed upon as to each such parcel by the Company and the insured at the time of the issuance of this policy and shown by an express statement herein or by an endorsement attached hereto.

11. Subrogation Upon Payment Or Settlement

Whenever the Company shall have settled a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant. The Company shall be subrogated to and be entitled to all rights and remedies which such insured claimant would have had against any person or property in respect to such claim had this policy not been issued, and if requested by the Company, such insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect such right of subrogation and shall permit the Company to use the name of such insured claimant in any transaction or litigation involving such rights or remedies. If the payment does not cover the loss of such insured claimant, the Company shall be subrogated to such rights and remedies in the proportion which said payment bears to the amount of said loss. If loss should result from any act of such insured claimant, such act shall not void this policy, but the Company, in that event, shall be required to pay only that part

of any losses insured against hereunder which shall exceed the amount, if any, lost to the Company by reason of the impairment of the right of subrogation.

12. Liability Limited to This Policy

This instrument together with all endorsements and other instruments, if any, attached hereto by the Company is the entire policy and contrast between the insured and the Company.

Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest covered hereby or any action asserting such claim, shall be restricted to the provisions and conditions and stipulations of this policy.

No amendment of or endorsement to this policy can be made except by writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

13. Notices, Where Sent

All notices required to be given the Company and any statement in writing required to be furnished the Company shall be addressed to Commonwealth Land Title Insurance Company, 1510 Walnut Street, Philadelphia, Pennsylvania 19102.

WARRANTY DEED

TOBRUK STABLES, INC., a New Mexico corporation, for consideration paid, grant to LLOYD A. HURLEY, M. D., a married man trading in his sole and separate estate whose address is ....., the following described real estate to Bernalillo County, New Mexico: Legal description coincides with legal description in title insurance policy.

SUBJECT TO the lien and assessment of the Middle Rio Grande Conservancy District.

SUBJECT TO all patent reservations, restrictive covenants, reservations of easements or rights-of-way of record.

SUBJECT TO all conveyances and restrictions of oil, gas, and other mineral rights of record.

SUBJECT TO Bernalillo County, New Mexico property taxes for 1978 and subsequent years.

Notorized signatures of grantors and recording stamp for December 13, 1977, in public records of New Mexico.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals
State of New Mexico
Susan W. Bagwell, Clerk

PETITION FOR REHEARING

(Filed August 5, 1983)

The Opinion fails to discuss that the Defendant Title Companies knew that the legal title to the property was

not Lloyd Hurley trading in his sole and separate estate. The Opinion makes a title policy a useless instrument and a means of fraud and would be destructive of the entire title industry in the State of New Mexico.

The Opinion turns the title insurance method of handling real estate transaction into a vehicle of fraud.

The Opinion, on page 4, last paragraph, says:

> "There is no authority that imposes a duty on the title company to conduct an investigation to see how title should be vested in a purchaser."

The above statement is in complete contradiction of title insurance. There is no reason for going to a title company unless they are under a duty to conduct an investigation about the title. In this particular case they know that the title was false.

There is no way in which the treatment and recognition or failure to recognize the real facts in this case can be equated with a due process appeal and therefore there would be a violation of the Fourteenth Amendment to the U. S. Constitution for failure to accord to the appellants an appeal which would satisfy the requisite of due process and equal protection of the laws under the Fourteenth Amendment. The Supreme Court of the United States has declared that when a state gives to litigants a right to appeal, that said appeal must comply with the Fourteenth Amendment, U. S. Const. Article VI, Section 2, New Mexico Const. guarantees one appeal. This is it for the appellants. We submit it violates the Fourteenth Amendment, U. S. Const. and also Article II, Section 18 of our Bill of Rights.

The basic reason for the constitutional violation is that this opinion is not intended to either follow existing law or to change it. It is neither stare decisis nor a motion to change existing law. It is an Opinion for these particular litigants and no one else. Whether it be special protection for the appellees for whatever reason or a deprivation of rights for the enforcement of duty in tort and contract owing to the plaintiffs, the fact remains that it violates equal protection of the laws because all parties involved are not being treated like other parties who have and will litigate title insurance policies where there is an intentional misstatement by the title companies and have admitted falsification of title, for the purpose of depriving Mrs. Hurley in her interest in the property.

Further indication of a violation of due process and the Fourteenth Amendment in the appeal is the failure to mention the insuring agreement which was intentionally violated by the title companies. Nowhere in the Opinion is there mention of the insured's agreement that the contract is breached if the title is other than as stated in the declaration. In other words, the express written promise of the insurance company is ignored. The result is that the Opinion goes on as if there never was a promise. "That the title is as stated."

Based on the above, labeling this decision a Memorandum Opinion is indicative of the fact of a constitutional violation of the Fourteenth Amendment, U. S. Const. and Article II, Section 18, because it deals exclusively with these litigants to protect the appellees and to non suit the plaintiffs and is not intended to have any application to other litigants' property owners or insured or insurers.

This is a clear breach of equal protection of the laws which is guaranteed to all litigants in state courts by the Fourteenth Amendment as stated above.

No. 15099

IN THE SUPREME COURT OF NEW MEXICO
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO

(Filed August 29, 1983)

COME NOW the Petitioners, Zenobia E. Hurley and Lloyd A. Hurley, through their attorneys and hereby petition the New Mexico Supreme Court to issue a Writ of Certiorari directed to the Court of Appeals of New Mexico for review of that Court's opinion in the case of *Zenobia E. Hurley & Lloyd A. Hurley, Plaintiffs-Appellants, and Cross-Appellees vs. Albuquerque Title Company, Inc., a New Mexico corporation and Commonwealth Land Title Insurance Co., a Pennsylvania corporation, Defendants-Appellees, and Cross-Appellants*, No. 5976.

Questions Presented for Review:

1. Does the Opinion violate the Constitution's absolute right of a New Mexico litigant to Article VI, Section 2, which says that, "an aggrieved party shall have an absolute right to one appeal"?

2. Does the Opinion violate the New Mexico Constitution by denying him an appeal which would be a "due process" appeal and a "equal protection of the laws appeal" and does the Opinion violate every constitution protection of Art. II, Section 18, of the New Mexico State

Constitution and does it also violate the 14th Amendment to the U. S. Constitution?

3. Is the label Memorandum Opinion an indication that the Court of Appeals did not and possibly could not or would not grant the absolute right of one appeal as guaranteed by the Constitution, Article VI, Section 2, Article II, Section 18 and 14th Amend. U. S. Const. to the "aggrieved" party?

• • •

7. Is this case an "exception", and therefore a violation of Art. II, Sec. 18, N. M. Const. and 14th Amend. U. S. Const., which provides for "equal protection of the laws"?

8. Did the Opinion overturn all existing contract law and destroy all obligations to keep a promise supported by the consideration of the payment of a premium by refusing to enforce the obligation of a Title Company when the Title Company issued a policy wherein the title recitals were otherwise than stated in the policy and when they knew they were issuing false title recitals and knowingly falsified the public records.

• • •

12. Does the Opinion set aside the community property laws of the State by making a wife's interest in community property a non-covered interest even though a premium is paid from community funds for her interest and even though the policy expressly covers her undivided interest as well as her spouse?

• • •

14. Does the foregoing "exception" violate Art. II, Sec. 18 and the 14th Amendment as being discriminatory based on sex?

• • •

16. Can a person (Zenobia Hurley) have her property falsely taken away from her by being eliminated from the deed and the public records and by a Title Company which did this intentionally, knowing that she had an interest in the property and that it was not her spouse's sole and separate property?

• • •

Facts Material to the Questions Presented:

Fundamentally, the Petitioners view the Court of Appeals Opinion as involving a violation of individual Constitutional rights, Art. VI, Sec. 2 and Art. II, Sec. 18, N. M. Const. and 14th Amend. The value placed upon Constitutional provisions protective of individual citizen's rights in 1983 is the issue. The basic facts are simply that the Title Company defendants issued a Title Policy to Lloyd A. Hurley, a married man, as his sole and separate property when they knew it was legally not his sole and separate property. This was done secretly as to the community property wife, of whose existence the defendants were aware and whom they knew had not signed any kind of consent or waiver. There was an "exception" in the policy for community interests of a spouse. The lower court granted summary judgment on the contract claims of both Petitioners and dismissed the tort claims as premature. On cross appeal the Court of Appeals affirmed

the dismissals and in addition, dismissed all the various tort claims by both Plaintiffs.

The Opinion by the Court of Appeals is entitled Memorandum Opinion which label means that something besides a full, regular, legal treatment was given to the appeal by the New Mexico Court of Appeals. The sparse, disjointed, superficial treatment of the numerous issues also is a "flag" indicative of a lack of "due process" appeal.

• • •

The Opinion in upholding the exclusion as to a "spouse" is in violation of *Frontiero v. Elliott Richardson*, 411 U. S. 677, 36 Fed. 2, 93 S. Ct. 764 (1973), *Wengler v. Druggists Mutual Insurance Company*, 466 U. S. 142, 64 Fed. 2, 107, 100 S. Ct. 1540, which "struck down" discrimination provisions based on sex. The opinion is in conflict with *Terrell v. Dulce City Lumber*, 86 N. M. 405, 524 P. 2d, 1021, a Court of Appeals Opinion which recognizes the existence of tort claims in New Mexico and their evolvement from breach of contract and would negative this Opinion which says in dismissing the Tort claims "the ownership was as designated by Doctor Hurley".

• • •

The Opinion is in conflict with Art. VI, Sec. 2, the Constitution of the State of New Mexico which is governed by Art. II, Sec. 18 of the New Mexico Constitution. The Opinion also is in violation of the 14th Amend. U. S. Const.

• • •

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. CV-81-08634

(SEAL)
ZENOBIA E. HURLEY and LLOYD A. HURLEY,
Plaintiffs,

vs.

ALBUQUERQUE TITLE COMPANY, INC., a New Mexico corporation, and COMMONWEALTH LAND TITLE INSURANCE COMPANY, a Pennsylvania corporation,

Defendants.

JUDGMENT PURSUANT TO MANDATE

(Filed October 14, 1983)

This matter having come before the Court upon the Motion for Defendants for Entry of Judgment Pursuant to Mandate and the Court having reviewed the Memorandum Opinion of the Court of Appeals entered on July 26, 1983 and the Mandate of the Court of Appeals issued on September 20, 1983, finds that Judgment Pursuant to Mandate should be issued.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss which the Court has treated as a Motion for Summary Judgment be and it hereby is granted.

IT IS FURTHER ORDERED that all claims and causes of actions in contract and tort which have been asserted in the Complaint be and they hereby are dismissed with prejudice.

/s/ Philip R. Ashby
District Judge

No. CV 81-08634

State of New Mexico County of Bernalillo

IN THE DISTRICT COURT

ZENOBIA E. HURLEY,

Plaintiff,

and

LLOYD A. HURLEY,

Involuntary Plaintiff,

vs.

ALBUQUERQUE TITLE CO., INC., a New Mexico corporation, and COMMONWEALTH LAND TITLE INSURANCE COMPANY, a Pennsylvania corporation,

Defendants.

AMENDED COMPLAINT

For Breach of Contract and Damages
(Filed December 11, 1981)

COMES NOW the plaintiff, Zenobia E. Hurley, and alleges that she is a resident of Bernalillo County, New Mexico. That involuntary plaintiff, Lloyd A. Hurley, is a resident of Sandoval County New Mexico. That the Albuquerque Title Co., Inc., is a New Mexico corporation. That Commonwealth Land Title Insurance Company is a Pennsylvania corporation. That this cause of action arose in Bernalillo County, New Mexico. That on December 13, 1977, plaintiff and involuntary plaintiff were husband and wife having been married in 1953. That on December 14, 1977, Lloyd A. Hurley filed for divorce which was granted in April of 1977. That on December 13, 1977, a real estate transaction occurred from which this cause of action arose.

Attached as Exhibits "A" and "B" are two title insurance policies issued by the Commonwealth Land Title Insurance Company which does business in New Mexico through resident title companies, who are agents but independent companies, one of which is the Defendant Albuquerque Title Company, Inc., a New Mexico corporation.

In this Complaint the Pennsylvania Title Company will be referred to as the "Pa. Title Co." and the Defendant Albuquerque Title Company will be referred to as the "Albuquerque Title Co."

• • •

Employees of Albuquerque Title Co. performed all the direct functions in issuing the title policies and in so doing acted as the agent of the Pa. Title Co., whom it selected as the nationwide company insuring the titles. That the Albuquerque Title Co. also acted as the escrow agent and did the "closing", including "closing statements" and recording in the official records of Bernalillo County the Deed and Mortgage and which the Pa. Title Co. Policies guaranteed.

• • •

The title insurance policy premiums were paid to the Pa. Title Co. after being collected by the Albuquerque Title Co.

COUNT I

1. That Zenobia E. Hurley brings this action and or in the names of Lloyd A. Hurley and Zenobia Hurley as joint owners of undivided real estate and or Lloyd A. Hurley for the benefit of the former community of herself and Lloyd A. Hurley.

• • •

5. That on or about December 13, 1977, the Pa. Title Co., pursuant to the type of insurance contracts it advertised itself as capable of making and performing, promised that it would pay the sum of $131,000.00 and the sum of $130,000.00 if, in fact, the title to certain real estate located in Bernalillo County, New Mexico, was not as stated by said defendant in its title insurance documents. These express written assurances were contained in the declarations of title insurance policies.

6. That both defendants knew the documents guaranteeing title in a particular individual in fee simple, viz Lloyd A. Hurley, a married man, as his "sole and separate property" were false and incorrect.

7. That the defendants knew of the existence of the plaintiff and her status as the legal wife of Lloyd A. Hurley and that she would be a community property owner of any property purchased by Lloyd A. Hurley.

8. That this failure is a breach of the contractual agreements in the Policies and also constitutes a breach of the promises made in the national advertising of Pa. Title Co.

9. That the defendants knew that the plaintiff had not signed the mortgage nor had she signed an agreement authorizing the purchase by her husband as his sole and separate property as was required by N. M. S. A., 1978, 40-2-4.

10. That the involuntary plaintiff relied upon the defendants to correctly state the legal titles to the purchased property and he insured the transaction so as to realize

this protection. That since Zenobia Hurley was his wife at this time this protection was hers also.

a. That the title insurance company received premiums for the issuance of this false title insurance policy.

b. That the defendant title insurance company guaranteed the title of said property to be in fee simple as a sole and separate estate of Lloyd A. Hurley, a married man, when they knew it was not.

c. That the title was, in fact, in the community composed of Lloyd A. Hurley and Zenobia E. Hurley, as man and wife, and has been so determined.

d. That since the divorce referred to above, title to the property is in the same two individuals as tenants-in-common.

e. That the defendant title insurance company is liable to the plaintiff and/or to the community now tenants in common and to the named insured, Lloyd A. Hurley.

f. That the promises contained in the title policy were directed to and for the benefit of the plaintiff herein since she was a member of the community and had become an owner of the property in question upon the execution of the deed covering the property in question.

• • •

Counts 2, 3, 4, 5, 6, 7 & 8 alleged estoppel fraud, violation of New Mexico regulatory statutes for title companies by false recital of titles and recording the same in

public records; gross negligence; slander of title; violation of national advertising warranties and covenants; unfair claim settlement practice in New Mexico law. Lack of good faith towards Zenobia Hurley for not informing her of the transaction knowing that she was a member of the community. The following constitute the title claims discussed in the opinion. Prayer for relief as for contract to deny the contract obligation and statutory and tort violations.

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT

No. CV-81-08634

ZENOBIA E. HURLEY and
LLOYD A. HURLEY,

Plaintiffs,

vs.

ALBUQUERQUE LAND TITLE INSURANCE COMPANY, a Pennsylvania corporation,

Defendants.

ORDER

(Filed August 1, 1982)

THIS MATTER having come before the Court on July 7, 1982 on Plaintiffs' Motion for Summary Judgment and on Defendants' Motion to Dismiss, which the Court will treat as a Motion for Summary Judgment, with Plaintiff Zenobia E. Hurley being represented by her attorney, Eugene E. Klecan, Plaintiff Lloyd A. Hurley represented by his attorney, Gene E. Franchini, and Defendants Albuquerque Title Company, Inc. and Commonwealth Land Title Insurance Company, Inc. being represented by their attorney, Leonard G. Espinosa, and the Court having

heard the arguments of counsel and being otherwise fully advised in the premises;

FINDS that there are no genuine issues of material fact and that Defendants are entitled to judgment as a matter of law.

IT IS, THEREFORE, ORDERED that Plaintiffs' Motion for Summary Judgment be, and the same is hereby denied.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss, which the Court has treated as a Motion for Summary Judgment, be, and the same is hereby granted.

IT IS FURTHER ORDERED that all of the contract claims which have been asserted in the Complaint be, and they hereby are dismissed with prejudice.

IT IS FURTHER ORDERED that the tort claims which are asserted in the Complaint be, and they hereby are dismissed on the grounds that they are premature.

PHILIP R. ASHBY
DISTRICT JUDGE

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

ZENOBIA E. HURLEY, Petitioner,

v.

COMMONWEALTH LAND TITLE INSURANCE COMPANY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The two Orders by the U. S. District judge dismissing the Complaint and Amended Complaint with prejudice appear in the Appendix p. 7a. The two Memorandum Opinions also appear in the Appendix pp. 11a.-14a.

The Judgment and Oinion by the 10th Circuit is in the Appendix. It is reported at 647 F.2d 1055 (1981).

JURISDICTION

The Opinion of the United States Court of Appeals for the Tenth Circuit, which affirmed the Summary Judgment againnst Petitioner, was entered on May 7, 1981. The Order denying Petitioner's Motion for Rehearing was entered on June 8, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

The following provisions of the Constitution of the United States and of the Constitution of the State of New Mexico are involved in this Petition:

QUESTIONS PRESENTED FOR REVIEW

1. Will the Petitioner, a married woman at the time of the event giving rise to this litigation, and a citizen of the community property State of New Mexico be deprived of her centuries old but ever renewed inheritance

of "equality" as a spouse by a provision in a title insurance contract which reads:

> "This policy does not insure against loss or damage by reason of the following:
>
> 5. Community property, dower, curtesy, survivorship, or homestead rights, if any, of any spouse of of the insured."

2. Is the Tenth Circuit Court of Appeals Opinion in this case, both in its language and ruling, a gender based discriminatory document and thus unconstitutional *and* does the judgment of Dismissal in the Opinions, stated to be based on the dilatory plea of premature filing of the Complaint which was never raised below, and which refuses to rule on the discriminatory "exception" in the Title Insurance Contract, a "due process" violation by the Court for the sake of preserving the status quo of inequality between the sexes established by the Title Insurance Company's "Exception" which was unconstitutionally preserved and endorsed by the United States District Court's dismissal with prejudice below? (The Opinion states its dilatory decision in these words: "Without finding it necessary to reach the various arguments advanced by the parties . . . it is the conclusion of this Court that the plaintiff's claims are simply not ripe for adjudication.")

3. Is the Opinion an Advocate in behalf of the "common law" rule on husband and wife property ownership as distinuished from the "civil law" concept of community property which has always prevailed in New Mexico and is the dilatory dismissal a means of impeding the remedies available to the "spouse" under community

property laws applicable to a New Mexico husband and wife holding New Mexico land?

4. Is New Mexico's State Equal Rights Amendment Art. II Sec. 18, nullified or unconstitutionally impeded by the Opinion?

5. Is Petitioner and all "spouses" in New Mexico to be deprived of their "equality" protection under the Treaty of Guadalupe-Hidalgo, Kearney's Code for the Territory of New Mexico, Constitutional provisions, Statutes and numerous judicial decisions of New Mexico's Supreme Court, thru the actions of the Federal Judiciary refusing to grant relief in a justiciable case in controversy?

Does the Constitution of the United States afford protection to the Petitioner, a New Mexico "spouse" from the invasion by a Private Pennsylvania Company and the Federal Judiciary, of the State Constitutional and legal rights?

6. Does the Opinion violate Petitioner's 14th Amendment, U. S. Const, rights as "a citizen of" New Mexico by its failure to protect her rights, privileges, and immunities guaranteed her by Art. II Sec. 5, New Mexico Const.?

Art. II Sec. 5. states that said "rights" and "privileges" guaranteed to the people of New Mexico by the Treaty of Guadalupe-Hidalgo shall be preserved inviolate. Community property was one of said "rights" and "privileges".

7. Does the U. S. Const. Amendement X require the Federal Courts to follow and apply fully State rulings and remedies on private owned land?

8. Was Petitioner's right to trial by jury violated by the U. S. District Court's dismissal and by the 10th Circuit Opinion's fact findings?

Do the Opinion and Dismissal properly invoke this Court's superintending control over lower court for adequate relief to the Petitioner?

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

September 11, 1981

Mr. Eugene E. Klecan
520 Sandia Savings Building
Albuquerque, NM 87102

Re: Zenobia E. Hurley,
v. Commonwealth Land Title Insurance
Company
No. 81-436

Dear Mr. Klecan:

The petition for a writ of certiorari in the above entitled case was docketed in this Court on September 2, 1981 as No. 81-436.

Forms are enclosed for notifying opposing counsel that the case was docketed. Also enclosed is a form for the entry of your appearance as counsel.

Very truly yours,

Alexander L. Stevas, Clerk
by /s/ Loretta S. Ruffin
Assistant

Enclosures

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

November 2, 1981

Mr. Eugene E. Klecan
520 Sandia Savings Building
Albuquerque, NM 87102

Re: Zenobia E. Hurley,
v. Commonwealth Land Title Insurance Company
No. 81436

Dear Mr. Klecan:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

Alexander L. Stevas, Clerk
/s/ Alexander L. Stevas

MOTION TO DISMISS

COMES NOW Defendant Commonwealth Land Title Insurance Company, by and through its attorneys Moses, Dunn, Beckley, Espinosa & Tuthill, and pursuant to Rule 12(b)(6) and 12(b)(7), New Mexico Rules of Civil Procedure for the District Courts, respectfully prays for an Order dismissing the Complaint with prejudice on the grounds that the Complaint fails to state a claim against the Defendant upon which relief can be granted.

Defendant intends to file certain collateral documents as permitted under Rule 56, and prays that the Court treat this matter as one for summary judgment.

WHEREFORE, Defendant respectfully prays for an Order dismissing the Complaint with prejudice.

DOCUMENTS IN SUPPORT OF MOTION TO DISMISS

The documents attached hereto are tendered in support of the Motion to Dismiss filed January 22, 1982 by Defendant Commonwealth Land Title Insurance Company:

1. From the record in Hurley vs. Commonwealth Land Title Insurance Company in the United States District Court for the District of New Mexico, No. CIV 78-673 B, certified copies of:

A. Complaint with exhibit

B. Motion to Dismiss

C. Affidavit of Robert Moore with attachments

D. Affidavit of Mike Knight with attachments

E. Order of 1/23/79

F. Amended Complaint with exhibits

G. Certificate of the Clerk of the District Court, State of New Mexico

H. Motion to Dismiss

I. Order of 8/22/79

2. Opinion of the United States Court of Appeals for the 10th Circuit in *Hurley vs. Commonwealth Land Title Insurance Company,* 647 F.2d 1055 (1981).

3. Letter from the Clerk of the United States Supreme Court dated November 2, 1981 denying Petition for Writ of Certiorari.

4. Opinion of the New Mexico Supreme Court, *Hurley vs. Hurley,* 94 NM 641, 615 P. 2d 256 1980.

UNITED STATES OF AMERICA, District of ss:

I, JESSE CASAUS, Clerk of the United States District Court for the District of NEW MEXICO, do hereby certify that the annexed and foregoing is a true and full copy of the original

CIV 78-673HB

ZENOBIA E. HURLEY

Plaintiff,

vs.

COMMONWEALTH LAND TITLE INSURANCE COMPANY

Defendant.

COMPLAINT w/attachments
MOTION TO DISMISS
AFFIDAVIT of ROBERT MOORE w/attachments
AFFIDAVIT of MIKE KNIGHT w/attachments
ORDER of 1/23/79
AMENDED COMPLAINT w/attachments
CERTIFICATE of the Clerk of the District Court, State of NM, ELOISE E. YOUNG
MOTION TO DISMISS
ORDER of 8/22/79

now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at ALBUQUERQUE this 21st day of JANUARY, A.D. 1982.

JESSE CASAUS
Clerk.

By /s/ Phyllis M. Rael
Deputy Clerk.

SWORN TESTIMONY IN OPPOSITION TO DEFENDANTS MOTION TO DISMISS IS ATTACHED HERETO AND FILED HEREIN

Defendants have filed some pleadings from United States District Court for the District of New Mexico in Cause No. 78-673B. The attachment is sworn testimony with a Certificate under the seal of the court for Bernalillo County New Mexico which was filed in Cause No. 78-673B.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 78-673B

ZENOBIA E. HURLEY,
Plaintiff,

vs.

COMMONWEALTH LAND TITLE INSURANCE COMPANY,
Defendant.

CERTIFICATE

The undersigned, Clerk of the District Court of the Second Judicial District of the State of New Mexico

hereby certifies that attached hereto as Exhibits "1" through "12", respectively, are true and correct copies of pages 3, 4, 5, 6, 9, 10, 18, 19, 20, 21, 22, and 29 of the deposition of Tommie Garcia in Cause No. DR-05768, styled Lloyd A. Hurley, Petitioner, vs. Zenobia E. Hurley, Repondent, taken on May 22, 1978, before Juanita Godding, a Notary Public.

Also attached hereto as Exhibits "13" through "15", respectively, are true and correct copies of pages 35, 36, and 37 of the deposition of Lloyd Hurley taken May 25, 1978, in the above cause.

WITNESS my hand and the Seal of this Court this 17th day of July, 1979, at 4:10 (P.M.)

ELOISE E. YOUNG,
Clerk of the District Court

By /s/
Deputy

TOMMIE GARCIA

was called as a witness by Repondent, and having first been duly sworn was examined and testified as follows:

EXAMINATION

BY MR. KLECAN:

Q. Would you state your name?

A. Tommie Garcia.

Q. That is spelled T-o-m-m-i-e; that is the feminine?

A. Yes.

Q. What is your position?

A. I am an escrow officer and vice-president of Albuquerque Title.

Q. How long have you been with the Albuquerque Title Company?

A. A year and a half.

Q. And it appears that he or another individual, Jerry Larranaga, had the authority to bind the Commonwealth Land Title to the title as guaranty?

A. Right.

Q. Were you ever a participant in any conversation wherein the question of title to this property was discussed?

A. Yes, sir.

Q. And was there any discussion about the fact that the purchaser, Lloyd A. Hurley, was taking title as a married man as his sole and separate estate?

A. Yes, sir.

• • •

Q. In regard to Respondent's Exhibit 2, underlined is "Too late now." "Re: Separate property agreement on Hurley." What does the "Too late" refer to?

A. It was when this transaction was brought in to me. I believe I had like just a week's time to get everything prepared and get it closed, and we were all rushing around trying to get everything done. And when I went to ask for the mortgagee's policy, at that time Mr. Thompson questioned me if I did have the property settlement agreement which the wife had signed. I explained to him no, that they were in a hurry to record this and disburse the monies to the

seller, and that it was my understanding that everything was taken care of, that it was not taken care of at that time where I would have had a copy of it, but it was my understanding that everything was going to be taken care of. So then at that time he decided to go ahead and insure and not wait. He did not ask me to hold everything up and not record until we had the property settlement agreement.

Q. Was that Mr. Thompson?

A. Yes.

Q. The "Too late now," referred to your notation of a conference that took place between you and Mr. Thompson?

A. That's right.

• • •

Q. Since you deal with titles and things like that, how did you come to the conclusion that legally it would be his sole and separate estate?

A. Legally it would not have been his sole and separate estate.

MOTION FOR SUMMARY JUDGMENT

COME NOW the Plaintiffs, Zenobia E. Hurley and Lloyd A. Hurley through their attorneys, Eugene E. Klecan and Gene Franchini, both of whom attorneys represent both Plaintiffs, and Lloyd Hurley has become a voluntary Plaintiff and adopted all of the allegations of the complaint.

Said parties move the Court for Summary Judgment on the issue of the liability of both Defendants or either of them to both Plaintiffs herein, and as grounds for the Motion for Summary Judgment assert:

1) That there are no issues of fact as to liability of Defendants.

2) That the amount of damages is not asserted as being a matter for Summary Judgment at this time.

3) That in support of their Motion the Plaintiffs incorporate by reference herein the testimony of Tommie Garcia, the affiant of the Defendants, and whose deposition is filed of record in the case of *Hurley v. Hurley*, Cause No. DR 77-5768 in the District Court of the State of New Mexico.

4) That the insuring provisions of the title insurance policies issued by the Defendants are contained in the title insurance policies which are in the possession of the Defendants and which are record in this case.

5) That in addition portions of the sworn testimony of Tommie Garcia are attached hereto in support of the Motion.

The 10th Circuit Opinion in case of Zenobia Hurley vs. Commonwealth is reported in 647 F. 2d 1055 (1981). It was an action by Zenobia Hurley only and against Commonwealth only.

EXHIBIT 17

ORDER

Filed March 23, 1979

This matter coming on for consideration upon the Motion of the defendant Commonwealth Land Title Insurance Company to dismiss and the Court having filed its Memorandum Opinion herein; Now, Therefore,

IT IS BY THE COURT ORDERED that the Motion of defendant Commonwealth Land Title Insurance Company to Dismiss be, and hereby is, granted and the plaintiff is given fifteen (15) days in which to file an amended complaint or the cause will automatically be dismissed with prejudice.

/s/ Howard [illegible]

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ. No. 78-673-B

ZENOBIA E. HURLEY, *Plaintiff*,

vs.

COMMONWEALTH LAND TITLE INSURANCE COMPANY,

Defendant.

ORDER

Filed August 22, 1979

This matter having come on for consideration upon the Motion of the defendant to dismiss, which is being

treated as a Motion for summary judgment, and the Court having filed its Memorandum Opinion herein concluding that the Motion is well taken; Now, Therefore,

IT IS BY THE COURT ORDERED that summary judgment is entered for the defendant and the plaintiff's Motion for summary judgment is denied and this action is dismissed.

/s/ Howard C. Bratton
United States District Judge

RULE 7. Opinions in civil cases.

(a) In civil cases it is unnecessary for the court to write formal opinions in every case. Disposition by order or memorandum opinion does not mean that the case is considered unimportant. It does mean that no new points of law, making the decision of value as a precedent, are involved.

(b) When the court determines that one or more of the following circumstances exists and is dispositive of the case, it may dispose of the case by order or memorandum opinion: (1) the issues presented have been previously decided by the supreme court or court of appeals; (2) the presence or absence of substantial evidence disposes of the issue; (3) the issues are answered by statute or rules of court; (4) the asserted error is not prejudicial to the complaining party; (5) the issues presented are manifestly without merit.

(c) All formal opinions shall be published. An order or memorandum opinion, because it is unreported and not uniformly available to all parties, shall not be cited as precedent. [Adopted, effective April 26, 1979.] NMSA 1978, Judicial Volume I, Misc. Pamphlet.

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

NO. 5976

ZENOBIA E. HURLEY and
LLOYD A. HURLEY, Appellants

v. BERNALILLO County

ALBUQUERQUE TITLE CO. INC., Appellees

CV-81-08634

MANDATE

TO: DISTRICT COURT CLERK

(Applicable items are indicated by an "X" below.)

1. (X) Attached is a true and correct copy of the original decision entered in the above-entitled cause.

2. (X) This decision being now final, the cause is remanded to you for any further proceedings consistent with said decision.

3. ——— Writ of Certiorari having been issued by the New Mexico Supreme Court and their decision now being final, this cause is remanded to you for any further proceedings consistent with said Supreme Court decision attached hereto.

4. ——— You are directed to issue any commitment necessary for the execution of your judgment and sentence.

5. (X) Cost Bill is assessed as follows:
Plaintiffs are assessed appellate costs

6. ——— District Court Clerk's Record returned herewith.

7. ——— Exhibits filed herein shall be picked at this Clerk's Office forthwith.

By direction of and in the name of the Chief Judge of the Court of Appeals, this 20th day of September, 1983.
(SEAL)

cc: Counsel

/s/ Susan W. Bagwell
Clerk of the Court of Appeals of the State of New Mexico

(Tear off and return this receipt)

NO. 5976

RECEIPT IS ACKNOWLEDGED of the original mandate

ATTEST: A true copy

/s/ Susan W. Bagwell
Clerk of the Court
of the State of New Mexico

By: Norma C. Lyrez